

Employment Law Trends and Continuing Priorities



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Employment Law Considerations

- **If you have employees . . . employment law impacts you!**
- Areas of “Employment Law”
 - Anti-Discrimination & Harassment
 - Race
 - Religion
 - Sex
 - Disability
 - National Origin
 - Age
 - Anti-Retaliation/ Whistleblower
 - Occupational Safety and Health Administration (“OSHA”)
 - Employee Retirement Income Security Act (“ERISA”)
 - Immigration
 - Fair Labor Standards Act (“FLSA”)
 - Family Medical Leave Act (“FMLA”)

Examples of Anti-Discrimination Laws

- **State Laws**

- Missouri Human Rights Act
- Missouri “Service Letter” Statute – Mo. Rev. Stat. § 290.140
- Kansas Act Against Discrimination

- **Federal Laws**

- Title VII of the Civil Rights Act of 1964
 - race; color; national origin; religion; sex
- 42 U.S.C. § 1981 (race)
- Pregnancy Discrimination Act
- Equal Pay Act (gender)
- Age Discrimination in Employment Act (40+)
- Americans with Disabilities Act
 - “regarded as” disabled
 - requires reasonable accommodation

What is “discrimination”?

- Adverse treatment in the “terms and conditions” of employment on the basis of a person’s race, color, national origin, age, sex (*including gender identity sexual orientation and pregnancy), religion, citizenship, disability, veteran status (or other protected status)
- Disparate treatment
 - Job requirements must be necessary and job related
- “Terms and Conditions”
 - Examples

Missouri Highlights

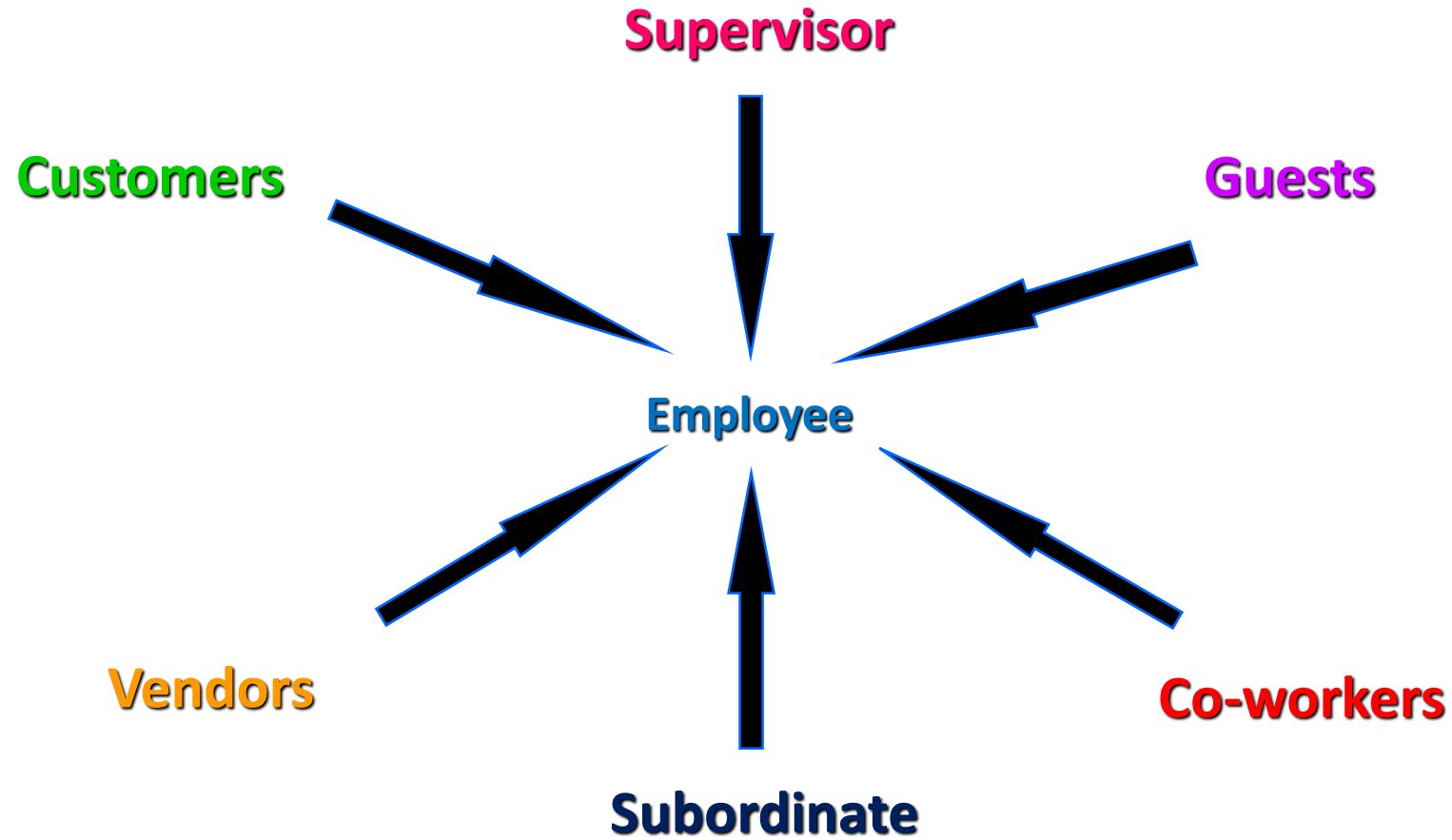
- No Longer the So Different – Senate Bill 43 effective August 2017
 - Created Whistleblower Protection Act
 - MHRA now more closely aligns to Federal Law
 - Previously the “Contributing Factor” standard now is “Motivating Factor”
 - Burden shifting, employer need only show a legitimate, non-discriminatory reason
 - Business Judgment
 - No longer individual liability
 - Damage Cap

Employment Law Trends and Priorities:

Me Too!

- Quid Pro Quo Sexual Harassment
 - When favorable employment decisions are based on granting sexual favors, or adverse decisions are made because sex is denied
- Hostile Environment Harassment
 - When the atmosphere is so intimidating, hostile, or offensive that it unreasonably interferes with an employee's ability to work
 - Unwelcome conduct directed at an employee because of his or her protected status
 - Which is sufficiently severe or pervasive to create a hostile work environment
 - Minor annoyances and petty slights

But WHO?



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- **Discrimination Trends:**

- Disability
 - Reasonable Accommodation
 - What is a “disability”?
- Religion
 - Reasonable Accommodation
- Age
- Biometric
 - Some states (not KS or MO yet) prohibit/limit use
- Sexual Orientation/Gender Identity

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- **LGBTQ**

- EEOC Strategic Enforcement Plan top priority for 2017-2021
 - “...the Commission ... interprets the statute’s sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity ...”
- Not explicitly prohibited by Title VII or MO or KS state law
- Congressional Efforts
 - The Equality Act of 2015
 - Employment Non-Discrimination Act 2013
- Sexual Orientation Discrimination IS sex discrimination under Title VII (7th Circuit – Supreme Court declined to review)
- New Views ... Attorney General Jeff Sessions

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- **Salary History Bans**

- California, Delaware, Massachusetts, Oregon, Puerto Rico
- San Francisco, New Orleans and New York City
- Considered but vetoed – New Jersey and Illinois
- Considered but not enacted – Idaho, Maryland, New York, Rhode Island, Texas, Virginia and Philadelphia (on hold pending litigation)
- Government Employer restrictions

- **Background Checks**

- “Ban the box”

- **But Why?**

- Permissible reason to pay someone less
- Background check related to job duties

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- **Arbitration Clauses in Employment**
 - Previously - varying state and federal opinions – Circuit Split
 - Recent Supreme Court Decision - Class Action Waiver in employment agreements enforceable
 - *Epic Systems Corp. v. Lewis*, No. 16-285, May 21, 2018
 - Combination of three cases involving FLSA Misclassification

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Marijuana

- 29 States and the District of Columbia – Legalized Medical Marijuana
- 8 States and the District of Columbia – Legalized Recreational Marijuana
- In the Workplace
- Anti-Discrimination in the Legislation
 - Card Holder vs. Positive Drug Screen
- Disability Discrimination?

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When to Call a Lawyer



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